**REDACTED VERSION**



**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C.**



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| In the Matter of | ) | |
| | ) | MB Docket No. 08-214 |
| NFL Enterprises LLC, | ) | File No. CSR-7876-P |
| Complainant | ) | |
| | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| Comcast Cable Communications, LLC | ) | |
| Defendant | ) | |

## DIRECT TESTIMONY OF JONATHAN ORSZAG

1. My name is Jonathan Orszag. I am a Senior Managing Director and member of the Executive Committee of Compass Lexecon. My services have been retained by a variety of public-sector entities and private-sector firms ranging from small businesses to Fortune 500 companies. These engagements have involved a wide array of matters, from entertainment and telecommunications issues to issues affecting the sports and retail industries. I have been active in applied analysis of issues affecting the Multichannel Video Programming Distributor ("MVPD") sector and have been a consultant to a number of major MVPDs, programming providers, and sports-related entities (including the National Collegiate Athletic Association). I have provided testimony to administrative agencies, the U.S. Congress, U.S. courts, the European Court of First Instance, and other domestic and foreign regulatory bodies on a range of issues, including competition policy, industry structure, and fiscal policy.

2. Previously, I served as the Assistant to the U.S. Secretary of Commerce and Director of the Office of Policy and Strategic Planning and as an Economic Policy Advisor on President Clinton's National Economic Council. For my work at the White House, I was presented the Corporation for Enterprise Development's 1999 leadership award for "forging innovative public policies to expand economic opportunity in America."

3. I am a Fellow at the University of Southern California's Center for Communication Law & Policy and a Senior Fellow at the Center for American Progress. I received a M.Sc. from Oxford University, which I attended as a Marshall Scholar. I graduated *summa cum laude* in economics from Princeton University, was elected to Phi Beta Kappa, and was named to the *USA Today* All-USA College Academic Team. In 2004, I was named by the *Global Competition Review* as one of "the world's 40 brightest young antitrust lawyers and economists" in its "40 under 40" survey. In 2006, the *Global Competition Review* named me as one of the world's "Best Young Competition Economists."

4. I have been asked by counsel for Comcast Cable Communications, LLC ("Comcast") to assess, from an economic perspective, the claims made in this proceeding by NFL Enterprises LLC ("NFL") regarding Comcast's carriage of the NFL Network. The NFL and its expert, Dr. Hal Singer[1] assert that Comcast's carriage of the NFL Network is discriminatory on the basis of affiliation because Comcast does not carry the NFL Network on the same tiers as two Comcast-affiliated networks, the Golf Channel

[1] *See* Comcast Ex. 85 ("Singer Report").

and Versus.[2] In addition, the NFL alleges that Comcast's conduct has harmed the NFL Network, viewers, and advertisers.[3]

5. My analysis focuses on (a) whether Comcast's decision to carry the NFL Network on Comcast's Sports Entertainment Package ("Sports Tier") amounted to discrimination on the basis of affiliation and (b) whether Comcast's carriage of the NFL Network had the effect of restraining unreasonably the NFL Network's ability to compete fairly. In addition, I examine whether there is any evidence to indicate that Comcast's carriage of the NFL Network has resulted in harm to competition from the perspective of viewers of video programming, advertisers, or the carriage of sports programming.[4]

## I. SUMMARY OF CONCLUSIONS

6. There is no valid basis for concluding that Comcast has discriminated against the NFL Network in favor of Comcast-affiliated sports networks, the Golf Channel and Versus, which Comcast carries on more highly penetrated tiers. Comcast's decision to distribute the NFL Network on the Sports Tier is consistent with rational business conduct based on considerations unrelated to the NFL Network's affiliation. Dr. Singer concludes that Comcast's carriage of the NFL Network amounts to discrimination on the basis of affiliation without even considering the value to Comcast of carrying the NFL Network on highly penetrated tiers or the NFL Network's carriage terms (including license fee). An analysis that ignores such considerations does not provide a reliable basis for the discrimination claims.

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[2] Comcast Ex. 19 ¶ 3; Comcast Ex. 85 ¶ 2.
[3] Comcast Ex. 19 ¶ 39; Comcast Ex. 85 ¶ 3.
[4] I previously submitted a declaration, jointly with Dr. Jay Ezrielev, in this proceeding. Declaration of Jonathan Orszag and Jay Ezrielev, Comcast Ex. 135 ("Orszag-Ezrielev Declaration").

7. The most direct and compelling evidence of the lack of discrimination can be seen in the carriage decisions of six of the seven largest other cable companies, which do not carry the NFL Network at all, but each of which carry both the Golf Channel and Versus. That is, other large cable companies – including ones that are not vertically integrated – have decided, like Comcast, that the Golf Channel and Versus should be more widely distributed than the NFL Network and all but one of them has decided that the NFL Network does not warrant carriage on their systems. Analysis strongly suggests that the NFL Network's relatively high carriage price was the reason why many MVPDs chose not to carry the NFL Network or chose to carry the network on less than highly penetrated tiers.

8. The fact that some other MVPDs carry the NFL Network on highly penetrated tiers is entirely consistent with Comcast's carriage decision. MVPDs who do carry the NFL Network may have assigned a relatively high value to carrying the NFL Network for reasons that are not applicable to Comcast. For example, DIRECTV has a business relationship with the NFL that extends beyond the carriage of the NFL Network: DIRECTV is the exclusive distributor of the NFL Sunday Ticket package of out-of-market games, and DIRECTV's NFL Network affiliation agreement is not independent of its NFL Sunday Ticket distribution agreement. Verizon also has a business relationship with the NFL that extends beyond the carriage of the NFL Network.

9. Dr. Singer asserts that a "market penetration test," which is based on the share of subscribers served by MVPDs with at least some carriage of the NFL Network (but only for subscribers of large MVPDs), demonstrates market-wide acceptance of the

NFL Network's carriage prices.[5] However, Dr. Singer's claim of market-wide acceptance of the NFL Network's carriage prices is based on a highly misleading measure of "acceptance" by MVPDs of NFL Network's carriage prices. Dr. Singer's measure of "market penetration" is largely driven by DIRECTV, which accounts for roughly half of all NFL Network subscribers and distributes the NFL Network through a bundled arrangement with DIRECTV's Sunday Ticket deal. Because of the unique relationship between the NFL and DIRECTV, the carriage of the NFL Network by DIRECTV does not provide a relevant measure of market-wide acceptance of the NFL Network's carriage prices. Dr. Singer's "market penetration" analysis also ignores the fact that the vast majority of MVPDs either do not carry the NFL Network at all or carry the network on less penetrated tiers. Thus, there is no reliable basis for Dr. Singer's claim that his "market penetration test" demonstrates market-wide acceptance of the NFL Network's carriage prices.

10. A key factor driving the value to Comcast of carriage of the NFL Network is the price per subscriber charged by the NFL Network. The NFL Network's average license fee is one of the highest among national cable networks. And despite the fact that cost is a critical element of any carriage decision, Dr. Singer does not conduct any analysis of the carriage costs of the NFL Network as compared to the carriage costs of Versus and the Golf Channel. Both the NFL in its Complaint and Dr. Singer in his report ignore other carriage terms as factors in Comcast's carriage decision and make no attempt to weigh these factors. Affiliation agreements contain a myriad of carriage terms, in addition to price. These other carriage terms, as well as the content displayed

[5] Comcast Ex. 65 ("Singer Dep.") at 30-34.

by the network, are also important elements of any MVPD's assessment of a network's value.

11. The evidence shows that Comcast's carriage of the NFL Network is based on a reasonable business judgment apart from any considerations related to Comcast's affiliation with the Golf Channel and Versus. There is no evidence that Comcast decided to move the NFL Network from its digital tier ("D2") to the Sports Tier to benefit any affiliated networks in Comcast's programming division. And Dr. Singer has not put forward any evidence that, ex ante, there was any reason to believe that the decision to move the NFL Network to the Sports Tier would not be profitable for Comcast's cable distribution division.

12. The value of the NFL Network's programming to an MVPD is determined in large part by the ability of the NFL Network to help the MVPD attract and retain subscribers. Because DIRECTV has offered on an exclusive basis a very large package of NFL out-of-market games as part of its Sunday Ticket package for well more than a decade and offers the NFL Network on a highly penetrated tier, viewers with a particular interest in out-of-market live NFL games, including many die-hard NFL fans, are disproportionately likely to be DIRECTV subscribers. Therefore, the value to Comcast of carrying the NFL Network on its more highly penetrated tiers is reduced to the extent that many, if not most, of those who choose to subscribe to Comcast may not have a strong interest in obtaining access to out-of-market live regular-season NFL games beyond those games already available on Sunday afternoons and evenings on broadcast television and on Monday night on ESPN. Furthermore, viewers who follow a particular NFL team have a relatively small chance of seeing their home team's games more

frequently than once per year among the eight regular-season games carried by the NFL Network. The value of the NFL Network's eight games is further reduced for the home market fans because they already have free access to NFL Network games on over-the-air broadcast television.

13. Dr. Singer's reliance on ratings to attempt to undermine Comcast's justifications for its carriage decision with respect to NFL Network is misguided. Ratings alone, in the absence of an analysis of carriage terms and the value proposition offered by a network, are meaningless for the analysis of the alleged discrimination. Ratings do not capture the value of carriage to the MVPD because ratings measure only the viewership of a program, and not the intensity of viewership or the viewers' loyalty to the network carrying the programming.

14. The NFL's claim that Comcast has unreasonably restrained the NFL Network's ability to compete fairly lacks any reliable economic foundation. The standard adopted by Dr. Singer for assessing whether Comcast's actions unreasonably restrained the NFL Network's ability to compete fairly is inconsistent with the economics literature, sound economic logic, and consumer welfare.

15. Dr. Singer's perspective can be summarized as follows: if, by hypothesis, Comcast is the most efficient distribution mechanism, a cable network has economies of scale (which all cable networks have), some unaffiliated programming competes with Comcast's affiliated programming, and Comcast distributes its own programming on a highly penetrated tier, then Comcast must carry the unaffiliated programming on the same highly penetrated tier at any price. Applying such a standard would be detrimental to consumers; under such a standard, subscribers may have to pay higher monthly fees

even if they did not want to view the programming that the NFL Network or any other independent programmer offers. Dr. Singer's standard lacks any limiting principle, and if adopted may (absurdly) require whichever MVPD is the largest at a given time to carry every channel arguably similar to any channel affiliated with the MVPD. Such a standard is anti-consumer and it should be rejected.

16. Comcast does not have the incentive to restrain the NFL Network's ability to compete because there is no valid basis for concluding that such a restraint would benefit its affiliated sports networks, the Golf Channel and Versus. If anything, Dr. Singer presents evidence that suggests that the Golf Channel, Versus, and the NFL Network each faces significant competition for viewers and advertisers from a number of sports networks. Given the large number of sports networks, prices charged by the Golf Channel and Versus cannot reasonably be constrained by the presence of the NFL Network on a more highly penetrated tier, and therefore, the NFL's whole theory of discriminatory intent (*i.e.*, that Comcast put the NFL Network on its Sports Tier to benefit the Golf Channel and Versus) has no basis in evidence or sound economic analysis.

17. As Dr. Singer himself admits,[6] there is no reason why the NFL Network could not obtain broader distribution by offering Comcast or any other cable company a lower license fee or better carriage terms. This dispute is, therefore, not about the NFL's ability to compete fairly, since it can clearly do so by adjusting its price and other carriage terms. At its heart, the NFL – whose exclusive control over NFL game rights

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[6] *See* Comcast Ex. 65 at 192:9-14 ("I think there is potentially, according to economic theory, a happier state of the world out there for the NFL in which they have greater penetration, greater advertising revenues at a lower price. That's what economic theory would predict.")

makes it one of the most economically powerful sports leagues in the United States – is asking the Commission to assist it in extracting more revenue from Comcast when the NFL has, wholly within its discretion through its carriage terms, the ability to obtain wider distribution.

18. Dr. Singer claims that his conclusions regarding harm to consumers and a diminution in the NFL Network's ability to compete follow directly from applying the economic theory literature on foreclosure and raising rivals' costs. Dr. Singer argues that the economic literature obviates any need to conduct an empirical analysis: he claims that the economic literature "presumes" harm to competition if certain market conditions are satisfied, such as the presence of scale economies in the production of video programming.[7] However, Dr. Singer misapplies the economic literature in reaching his conclusions. The economic models cited by Dr. Singer do not "presume" that harm has occurred if specific market conditions are satisfied. The models cited by Dr. Singer provide only a *theoretical* framework for conducting further *empirical* analysis. Yet, Dr. Singer has not conducted any *empirical* analysis to support his presumption. Dr. Singer has not even established that the *theoretical* conditions of the literature apply to this case. Therefore, Dr. Singer does not establish a reliable basis for his conclusion of harm to competition.

19. Comcast subscribers who do not value the NFL Network at all or value the NFL Network modestly benefit from Comcast's decision to carry the NFL Network on the Sports Tier because carrying the network on a more highly penetrated tier would have resulted in higher prices for most Comcast subscribers, including those without any

[7] *See* Comcast Ex. 65 at 97:12-98:5.

interest in the NFL Network's programming. Dr. Singer simply ignores that these Comcast consumers would have been made worse off if Comcast had decided to carry the NFL Network, with its 55-cent per month per subscriber surcharge, on a more highly penetrated tier. Dr. Singer's assumes that Comcast will not pass on to consumers any increases in programming costs; however, this assumption is contradicted by basic economic theory, as well as economic research of the MVPD industry. As a result, Dr. Singer has not established a proper foundation for his claim that any asserted consumer benefits of broader NFL Network distribution would outweigh the substantial consumer cost savings from more limited carriage of the network.

20. Dr. Singer presents an analysis that purports to estimate the "fair market value" of the NFL Network. However, his analysis is fundamentally flawed. Among other problems with his econometric analysis, he ignores all of the MVPDs that have decided that the price of the NFL Network exceeds the value of the channel (*e.g.*, Time Warner, Charter, Cablevision, Bright House, Suddenlink, Mediacom, etc.); commits significant econometric errors that render his results unreliable; and fails to account for the fact that the "price" paid by DIRECTV is not a market-based price.

21. A simple test shows the unreliability of Dr. Singer's analysis. Dr. Singer has nine MVPDs in his sample. I use his precise model, but withhold one MVPD from the regression analysis, and then use those model results to predict the price for the "withheld" MVPD. If his model were reliable, one would expect that the predicted price for the withheld MVPD would be reasonably close to the actual price paid by that MVPD. However, Dr. Singer's method fails such a test for nearly half (4) of the nine MVPDs. In other words, nearly half the time, the actual price paid by the MVPD is not

within Dr. Singer's confidence interval of the predicted price. For these reasons, as well as others, Dr. Singer's estimates cannot be relied upon.

22. At its core the matter before the Commission is a dispute between the NFL and Comcast over the terms of carriage for the NFL Network. The NFL is seeking to obtain from Comcast carriage terms (such as price and conditions of carriage) for its network that Comcast has been unwilling to accept, and the NFL has asked the Commission to intervene on its behalf so as to obtain more favorable carriage terms. Under the remedy sought by the NFL, the Commission would intercede in the bilateral negotiations between the NFL Network and Comcast and impose carriage terms that are more favorable to the NFL Network than those that Comcast is otherwise willing to accept.

23. While I am a strong believer in regulatory intervention when circumstances warrant such intervention, I also understand that such regulatory actions carry a cost. Market transactions, such as bilateral agreements between suppliers and distributors, are critical for an efficient allocation of industry resources, meeting consumer demand, and providing incentives for investment in the supply of products and services. Thus, market transactions provide important benefits for consumers, and intrusion into such transactions can, under certain circumstances, harm consumer welfare. Regulatory policy should override market mechanisms only in the presence of evidence that markets have failed or where that intervention is essential for protecting consumer welfare. Given that the NFL Network has in its own power the ability to obtain the wider distribution it seeks, it is clear to me that the circumstances of this case do not justify regulatory intervention in this business dispute.

24. The ability of MVPDs to refuse carriage terms they find to be unreasonable is essential to holding down consumer prices of video programming. Weakening vertically integrated MVPDs' ability to refuse carriage terms would enable cable networks to charge higher license fees (and impose other carriage terms that raise costs for MVPDs). As a result, MVPDs would be forced to pass on higher carriage costs to consumers, and consumers would face higher prices for video programming. Thus, compelling vertically integrated MVPDs to carry video programming at terms they find to be unreasonable may result in significant consumer harm. However, this is precisely what the NFL seeks to do in its carriage complaint. The NFL has asked the Commission to compel carriage of the NFL Network on Comcast's highly penetrated tiers even though Comcast has made the business judgment – like a number of other large MVPDs – that the costs of the carriage terms sought by the NFL exceed the value to Comcast of carrying the NFL Network on these tiers.

25. In summary, there is no valid support based in fact or economic analysis for the assertion that Comcast's decision to place the NFL Network on the Sports Tier discriminated against the NFL Network, restrained the NFL Network's ability to compete fairly, or harmed viewers, advertisers, or content providers. Dr. Singer has not provided any valid empirical evidence or economic analysis in support of these assertions.

26. In the remainder of my testimony, I discuss the basis for my conclusions.

## II. DISCRIMINATION ON THE BASIS OF AFFILIATION

27. I understand that in 1993 the Commission adopted regulations (as directed by Section 616 of the Communications Act of 1934, as amended) which state that:

> "No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video

> programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors."[8]

I further understand that under the Commission's regulations, to establish that Comcast has engaged in prohibited conduct, the NFL must demonstrate that:

(a) Comcast's distribution of the NFL Network discriminated "on the basis of affiliation ... in the selection, terms, or conditions for carriage of video programming;" <u>and</u>

(b) The effect of Comcast's distribution of the NFL Network was to "unreasonably restrain the ability" of the NFL Network "to compete fairly."

28. The NFL's claim of discrimination on the basis of affiliation rests on essentially four points: (1) Versus and the Golf Channel are affiliated with Comcast, and the NFL Network is unaffiliated with Comcast; (2) the NFL Network, Versus, and the Golf Channel are all national sports networks, which purportedly makes them similarly situated; (3) the NFL Network, as currently distributed, has higher ratings than either Versus or the Golf Channel; and (4) Comcast carries the NFL Network on its Sports Tier – which is made available to virtually all Comcast subscribers and is purchased by approximately [redacted] (or roughly [redacted] of) Comcast subscribers – and Comcast carries both Versus and the Golf Channel on more highly penetrated tiers.[9] As I discuss below, the assertions put forth by the NFL do <u>not</u> establish an economic basis for its claims of discrimination on the basis of affiliation.

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[8] *See* Comcast Ex. 136.

[9] Comcast Ex. 137; Comcast Ex. 19 ¶ 62. There are approximately [redacted] Comcast Sports Tier subscribers, in addition to about [redacted] Comcast subscribers who receive the NFL Network on other digital levels of services. Comcast Ex. 138 ¶ 14 (submitted as Exhibit 2 to Answer of Comcast Cable Communications, LLC, *In the Matter of NFL Enterprises LLC vs. Comcast Cable Communications*, File No. CSR-7876-P, June 20, 2008 ("Comcast Answer").

29. There are a number of legitimate, non-discriminatory factors unrelated to the NFL Network's affiliation that can (i) explain Comcast's decision to carry Versus and the Golf Channel on a more highly penetrated tier and the NFL Network on the Sports Tier and (ii) show why the NFL's claims are otherwise misguided. The most direct and compelling evidence with regard to (i) and (ii) is the carriage decisions of other cable companies. I then discuss a number of factors that provide evidence with regard to (i) and (ii) and address specific assertions made by Dr. Singer in his Report.

### *A. Carriage decisions by other MVPDs*

30. The most direct and compelling evidence of the lack of any discrimination by Comcast against the NFL Network is found in the carriage decisions by other MVPDs that are not affiliated with Versus or the Golf Channel. Numerous MVPDs that have no such affiliation choose to carry Versus and the Golf Channel on highly penetrated tiers, and they have chosen not to carry the NFL Network at all. Table A below shows how the NFL Network, the Golf Channel, and Versus are carried by the eight largest cable companies; each of these eight cable companies has more than one million subscribers. Six of these cable companies – Time Warner, Charter Communications, Cablevision, Bright House, Suddenlink, and Mediacom – carry the Golf Channel and Versus and do not carry NFL Network at all. And none of these cable companies owned a national sports network at the time they decided not to carry the NFL Network.[10,11] The decisions of these cable companies to carry the Golf Channel and Versus and not to carry the NFL

[10] Paul Allen owns a controlling interest in Charter Communications and the Seattle Seahawks, an NFL team. Thus, even an NFL team owner has decided to carry Versus and the Golf Channel on expanded basic and to not carry the NFL Network at all. Comcast Ex. 139; Comcast Ex. 140.

[11] Time Warner recently acquired an equity stake in the MLB Channel.

Network support my assessment that Comcast's decision to carry the NFL Network on its Sports Tier is reasonable given the NFL Network's carriage price and other terms, rather than being an attempt to discriminate against the NFL Network in favor of Versus and the Golf Channel.

**Table A.**
**NFL Network, Golf Channel and Versus Penetration Rates by Top 8 MSO Cable Providers**

[redacted]

***Sources:***
http://www ncta.com/Stats/TopMSOs.aspx (Downloaded March 11, 2008)
NFLE_FCC_0107114
COMNFL_FCC_00016044 - 045

* Note that Time Warner Cable and Bright House Networks report subscriber numbers jointly to Golf Channel and Versus and thus the penetration rates reported for Time Warner Cable and Bright House Networks represent the combined penetration rate on these two cable MSOs.

31. Bright House, which does not own a national sports network and is the sixth largest cable provider in the United States, has posted to its website its own logic for not carrying the NFL Network and why it wants to carry it *only* on a sports tier. Bright House writes that, "NFLN appeals to only a small segment of our customers on a year-round basis and it is highly priced. For these reasons, we still believe that the most appropriate place for NFLN is on a sports tier. Carriage in this manner permits customers who want to watch NFLN to do so, but those who do not, won't be forced to bear the

costs associated with NFLN."[12] Bright House also notes that the games on the NFL Network "are only available for six weeks a year; yet the NFL is seeking carriage through out the year" and therefore Bright House is seeking to carry the NFL Network on a sports tier or premium basis "to put the interests of fans first."[13] Bright House also concludes that including the NFL Network in a more highly penetrated tier would result in higher prices to consumers.[14]

32. Suddenlink, another non-vertically integrated cable company made similar statements: Specifically, Suddenlink stated that it "wants to reach a deal for our customers who want the network, but we don't want 100% of our customers to have to pay for it."[15] Suddenlink continued to state that the NFL "would accept nothing less than the same $100 million ransom they demanded more than a year ago."[16] Private correspondence between other MVPDs and the NFL provides even further evidence that numerous MVPDs held the view that the NFL Network's carriage price is high relative to the value of the network's programming.[17]

33. Dr. Singer attempts to counter the weight of the decisions of the major MVPDs who do not carry the NFL Network by the "subscriber-rated basis of MVPDs" who do carry the NFL Network.[18] First of all, Dr. Singer's "market penetration test" ignores the fact that DIRECTV accounts for roughly half of all NFL Network subscribers. Second, Dr. Singer ignores evidence of differentiation in the carriage of

[12] *See* Comcast Ex. 141.
[13] *Id.*
[14] *Id.*
[15] *See* Comcast Ex. 142.
[16] *Id.*
[17] *See* Comcast Ex. 143.
[18] Comcast Ex. 65 at 33:13-14.

sports programming among MVPDs. The decisions by Comcast and Cox Communications not to carry the NFL Network on their most highly penetrated tiers (and of Time Warner, Cablevision, Charter Communications, Bright House, Suddenlink, and Mediacom not to carry the NFL Network *at all*) are entirely consistent with the carriage of the network by other MVPDs, such as DIRECTV and Verizon, that do carry the NFL Network on their most highly penetrated tiers. A natural outcome of competition in the provision of differentiated products (such as video programming distribution) is some degree of differentiation among competitors.[19] That is, competing MVPDs may provide *differentiated* services that attract consumers with different preferences.

34. The benefits of differentiated products competition are highlighted by the example of DIRECTV. DIRECTV markets itself as "the home for sports fans."[20] The business relationship that DIRECTV has with the NFL is unique – DIRECTV is the exclusive distributor of the NFL Sunday Ticket package of out-of-market games. In fact, DIRECTV's Executive Vice President recently stated that Sunday Ticket is "something that's part and parcel of our brand."[21] The NFL Network and NFL Sunday Ticket distribution agreements are related and may be thought of as bundled agreements.[22] As a result, it is not surprising that DIRECTV subscribers account for roughly [redacted] of all NFL Network subscribers.[23] Importantly, for the analysis here and below, DIRECTV's

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[19] *See, e.g.*, Comcast Ex. 144 (United States Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, § 2.21).

[20] *See* Comcast Ex. 145.

[21] Comcast Ex. 93.

[22] [redacted] Comcast Ex. 137; Comcast Ex. 85 n. 85.

carriage of the NFL Network on highly penetrated tiers may not be entirely a reflection of DIRECTV's assessment of the value of the NFL Network's programming, but may also reflect the wider business relationship between the NFL and DIRECTV.

35. The carriage strategies of the NFL Network by DBS operators, telephone companies, and overbuilders are consistent with a strategy of differentiating their product offerings relative to the incumbent cable companies.[24] Such carriage strategies are natural consequences of differentiated services competition. Thus, the fact that DIRECTV, Verizon, and some others carry the NFL Network on their most highly penetrated tiers does not in any way imply that decisions by other MVPDs not to carry the NFL Network or carry it on a sports tier are motivated by discrimination or are inconsistent with sound business judgment. Indeed, given that six of the largest other cable companies are not carrying the NFL Network at all, and Comcast has carried the NFL Network since the fall of 2004, Comcast has actually done more to help the NFL Network achieve its distribution level than cable companies which do not have affiliated national sports programming.

36. MVPD executives have also stated publicly that their decisions to not carry the NFL Network were profitable. An executive of Mediacom, which is *not* vertically integrated with any programming networks, stated on an investor call that, "we produced the best subscriber performance in a couple years so I do want to emphasize that our decision not to carry these two networks [the NFL Network and the Big Ten Network] with the prices and the tiers that they were demanding was absolutely the correct decision and we will stay firm and unless the price changes or their demands

[24] Also note that DBS providers and overbuilders may not face the same types of capacity constraints that Comcast faces on its analog expanded basic tier.

change, we're going to stay firm in how we approach this business going forward in launching high-priced niche networks for which a very small percentage of our consumers are willing to pay but yet with respect to the two networks that want all our consumers to pay a certain price."[25]

### *B. Differences in programming content*

37. A comparison of Comcast's carriage decisions with regard to the NFL Network, Versus, and the Golf Channel for the purpose of assessing the NFL's discrimination claims is complicated by the fact that the NFL Network, Versus, and the Golf Channel all differ significantly in the content they present and the viewers they attract. Because the three networks provide different sports-related content that appeals to different groups of viewers, an MVPD's carriage decisions with respect to Versus and the Golf Channel may imply very little about the MVPD's optimal carriage strategy for the NFL Network (even putting aside the significant price differential). Thus, a comparison of an MVPD's carriage of the Golf Channel and Versus with that of the NFL Network may not be a very meaningful gauge of discrimination on the basis of affiliation. Dr. Singer's analysis of the discrimination claims appears to be based on the undisputed notion that the NFL Network, Versus, and the Golf Channel all predominantly carry sports-related programming, but the fact that the channels carry such programming does not necessarily mean that they are substitutes from the perspective of viewers or advertisers and Dr. Singer does not conduct any analysis to support such a conclusion.

38. The NFL Network carries eight live regular-season NFL games per year, a limited amount of other live games programming (such as two preseason NFL games and

[25] Comcast Ex. 147.

a small number of college bowl games), as well as NFL game replays, the NFL draft, and other football-related content.[26] The network's carriage of the eight regular-season NFL games is not exclusive: these games are also shown on major broadcast networks' affiliates in the teams' home markets.[27] Versus carries a wide variety of live sports programming, including Tour de France, live NHL games, live NCAA football games, the Professional Bull Riders, IndyCar racing, and other special-interest sports programming.[28] Much of the programming is carried live and on an exclusive basis. The Golf Channel primarily carries golf-related content, including PGA, LPGA, European, Champions, and Nationwide Tour Coverage, as well as analysis, instruction, and other golf-related content.[29]

39. The fact that all three networks predominantly carry sports-related programming does not imply that they employ identical business strategies, have the same economics of carriage, or target similar viewers or demographic groups. The live regular-season NFL game content carried on the NFL Network unquestionably appeals to die-hard NFL fans and many football fans in general, but this content is displayed during a limited part of the year (i.e., six to eight weeks). The overwhelming majority of programming carried on the NFL Network consists of game replays, highlights, analysis, commentary, coverage of the draft (which is also covered elsewhere), and classic NFL games.[30] By comparison, Versus carries significantly more live sports content and does not concentrate on a single sport. Versus carries live NHL games, as well as a number of

[26] *See* Comcast Ex. 119.
[27] Comcast Ex. 148.
[28] *See* Comcast Ex. 149.
[29] *See* Comcast Ex. 150.
[30] *See* Comcast Ex. 119.

other sports that receive relatively little coverage on other sports networks, such as bull riding and cycling (thus Versus likely has a loyal following among fans of these sports). The Golf Channel carries programming content of a single sport that has tens of millions of participants in the U.S. alone.[31] The Golf Channel also features content about golf technique, equipment, golf courses, and other programming that appeals to participants of the sport. Thus, given the vastly different type of content and appeal of the programming carried by the NFL Network, Versus, and the Golf Channel, it is reasonable to expect that MVPDs may employ distinct carriage strategies for the three networks so that carriage of Versus or the Golf Channel on a given tier of an MVPD does not imply that the NFL Network will necessarily be carried on the same tier.

40. There is no fixed formula utilized by MVPDs to determine whether and how they will carry a particular sports network. Table B below shows a list of major national sports networks,[32] their MVPD household penetration rates, year of launch, and license fee attributes.[33] The table shows that MVPD household penetration rates (*i.e.*, share of total MVPD households that are subscribers of the network) vary considerably across sports cable networks. Figures 1 and 2 depict graphically the relationship for

[31] According to the National Golf Foundation's 2008 golf participation study, there were 29.5 million golfers in the U.S. in 2007. *See* Comcast Ex. 151.

[32] The list excludes regional sports networks (RSNs). RSNs are primarily carried in the home markets of the teams carried by the network, and the (national) MVPD household penetration rate for RSNs is not a meaningful benchmark for national sports networks.

[33] This analysis is based on SNL Kagan data, which differ slightly from other data I analyze elsewhere in this report. I use the SNL Kagan data here because it allows me to use a consistent data series across programming channels. The SNL Kagan data set is based on a survey rather than actual accounting and may not perfectly measure network attributes. To the extent that the SNL Kagan data do not perfectly capture network attributes, I am assuming that any measurement errors are consistent across programming networks.

national sports networks between MVPD household penetration rates and year of launch and also the license-to-advertising revenue ratio.[34]

[34] The license-to-advertising revenue ratio is an estimate of the price of carriage in license fee per subscriber normalized by the advertising revenue per subscriber. The license-to-advertising revenue ratio should be viewed as a proxy and not a precise estimate of the license fee for a given level of subscriber interest intensity captured by the advertising revenue. An alternative measure of the price of carriage is the license-to-total-net revenue ratio.

**Table B. MVPD Household Penetration Rate, Year of Launch, Avg. License Fee, License to Advertising Revenue Ratio, and License Revenue as Percent of Total Revenue National Sports Networks in 2007**

[redacted]

**Figure 1. MVPD Household Penetration Rate and Year of Launch for National Sports Networks in 2007**

[redacted]

**Figure 2. MVPD Household Penetration Rate and License to Ad Revenue Ratio for National Sports Networks in 2007**

[redacted]